UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

J&J SNACK FOODS HANDHELDS CORP.

and

TEAMSTERS, WAREHOUSEMEN, GARAGE EMPLOYEES AND HELPERS, LOCAL UNION NO. 839, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Cases 19–CA–126632
19–CA–127401
19–CA–127413
19–CA–127689
19–CA–134279

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for the General Counsel.
James J. Sullivan. Jr., Esq.,
for the Respondent.
John Lee, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in Pendleton, Oregon on December 16–17, 2014, and in Seattle, Washington by way of videoconferencing on January 8, 2015.[1] The Teamsters, Warehousemen, Garage Employees and Helpers, Local Union No. 839 (the Charging Party, the Union, or Local 839), filed the original charge in Case 19–CA–126632 on April 15, 2014, and the first amended charge on May 14, 2014.[2] The Union filed the charge in Cases 19–CA–127401 and 19–CA–127413 on April 25. In Case 19–CA–127689, the Union

[1] Witness John Humble was hospitalized with a kidney stone on December 16. The parties agreed to secure Humble's testimony via videoconference. I find there was good cause and compelling circumstances present based on the unforeseen nature of Humble's unavailability. Fed. R. Civ. P. 43(a). The Fed. R. Civ. P. 43, Notes of Advisory Committee on Rules—1996 Amendment, state that "the most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons such as accident or illness . . .". Moreover, the Notes state that "Good cause and compelling circumstances may be established with relative ease if all parties agree that testimony should be presented by transmission."

[2] All dates in 2014 unless otherwise indicated.

filed the original charge April 30 and the first amended charge on May 14. On July 31, the General Counsel issued a complaint consolidating these charges. The Union thereafter filed a second amended charge in Case 19–CA–127689 on June 27. On August 7, the Union filed the charge in Case 19–CA–134279. The General Counsel issued a second complaint on October 29, consolidating all the above-referenced charges. J&J Snack Foods Handhelds Corp. (the Company or the Respondent) filed a timely answer denying all material allegations and setting forth defenses.

The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by: (1) telling employees that the Union's representative was no longer permitted on the Respondent's premises; (2) failing and refusing to recognize the Union's representative; (3) denigrating and disparaging the Union; (4) encouraging employees to abandon support for the Union and its representative; (5) promising employees, by soliciting employee complaints and grievances, increased benefits and improved terms and conditions of employment if they abandoned their support for the Union.

The complaint further alleges that the Respondent violated Section 8(a)(5) and (1) of the Act when it bypassed the Union and: (1) solicited employees to indicate whether their contact information could be shared with the Union; (2) solicited employees to communicate shift preferences directly to the Respondent in a manner that implied that granting the shift preference depended on whether they indicated their contact information could be shared with the Union; (3) ceased its practice of providing employees with food products; (4) implemented a requirement that Union representatives provide the plant manager with 24-hours notice of their visits to the facility; (5) implemented a requirement that Union representatives sign in and out of the plant with either the plant manager or the human resources manager; (6) implemented a requirement that Union representatives visit the plant during administrative hours; (7) implemented a requirement that the Union representatives confine their visits to the cafeteria; (8) imposed a requirement that the Union representative not use the cafeteria as a Union hall and limit visits to a "respectable" amount of time; and (9) banned Union representative Richard Davies from the facility.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with a facility in Weston, Oregon, manufactures and distributes snack foods. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A . The Respondent's Operations

J&J's Weston plant produces a variety of food products, including pretzels, pretzel dogs, and what employees commonly referred to as pizza pockets or hot pockets.[3] These pockets consist of pork, sauce, and cheese enrobed in a piece of dough, which is then flash fried and frozen. J&J also co-packs for NutriSystem and ALDI's Fit and Active product. (Tr. 367–368.)[4] The plant was built by Lamb Weston and subsequently absorbed into ConAgra. J&J took over the plant from ConAgra in 2011. The plant operates Monday through Friday, 24-hours a day, with 3 different shifts.

Adam Ligon became the plant manager on October 14, 2013. Prior to that, John Humble was the plant manager from August 2012–October 2013. Rob Tiburino served as plant manager before Humble. When Ligon came on board, Humble became the quality assurance manager. William "Mike" Adams, was a production supervisor until the summer of 2014, when he became the production manager. (Tr. 279.) Karyn Schofield became the human resource (HR) manager in January 2014. Prior to that, Linda Milagros was the HR manager.[5] Sandy McCullough has worked at the plant since she was 16-years-old in a variety of positions. McCullough was acting HR manager after Milagros left and before Schofield was hired, but her title was HR administrator.

B. The Bargaining Unit and Union Representatives

Since around 2005, the Local 839 has represented a wall-to-wall unit of all hourly maintenance, sanitation, production, and quality assurance (QA) employees at J&J and its predecessors. J&J voluntarily recognized the Union when it took over the plant from ConAgra. (Jt. Exh. 3.) Of J&J's roughly 165 employees, about 155 are Union members. (Tr. 367.) J&J and the Union have been parties to successive collective-bargaining agreements. The first ran from September 1, 2011, to September 30, 2013, and the second commenced on October 1, 2013, and runs through September 30, 2017. (Jt. Exhs. 1, 2.)

Robert Hawks has served as the Local 839's secretary-treasurer since 1995. Three business representatives, including Richard Davies, report to him. Davies became a business representative for the Union in 2006. (Tr. 61.) He was assigned responsibility for the bargaining unit at J&J in 2007.[6] One reason Hawks assigned Davies to the J&J bargaining unit is because he is bilingual, and the majority of the employees in the unit speak only Spanish. (Tr. 186.)

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[3] This product is not the same as the trademarked frozen product Hot Pockets that Nestle produces.

[4] Abbreviations used in this decision are as follows: "Tr." for transcript; "R Exh." for Respondent's exhibit; "GC Exh." for General Counsel's exhibit; "Jt. Exh." for joint exhibit; "CP Exh." for Charging Party Exhibit; "GC Br." for the General Counsel's brief; "R Br." for the Respondents' brief; and "CP Br." for Charging Party's brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based on my review and consideration of the entire record.

[5] The HR manager position has experienced a great deal of turnover. Prior to Milagros, Lori Ulrich was the HR manager; prior to Ulrich, Linda Villareal was the HR manager.

[6] Davies is also the Union's recording secretary.

Business Representative Jaime Olvera was assigned responsibility for the bargaining unit at J&J on April 25, 2014.

The Union's offices, in Pasco, Washington, are about 65 miles from J&J's Weston facility.

C. Access to the Plant

The plant is secure, and employees enter it using individual passcodes. Visitors, including union representatives, enter the administrative waiting area, sign in as guests, and receive temporary passcodes and badges. Any of the administrative staff in the front office can issue visitors' badges. (Tr. 302.)

The collective-bargaining agreement also has a provision addressing visitation. Article 11.3 provides:

> The Company shall admit to the plant during working hours any authorized representative(s) of the Union for the purpose of ascertaining whether or not this Agreement is being observed, and to assist in adjusting grievances. Such Union representatives shall contact the Plant Manager or his designated representative prior to entry. The parties also agree that while on the Company's premises, Union Representatives agree to comply with J&J Snack Foods Handhelds Corp.'s reasonable safety and security policies and practices. Conferences or meetings between union representatives and employee(s) shall be conducted in non-working areas and on non-working time so that there shall be no interference with or interruption of normal operating conditions.

Davies generally visited the plant once a week for about 2–6 hours per visit. His visits were this long to maximize the 65-mile drive from his office to the plant, and also to visit with employees on each of the shifts. His practice upon arrival was to enter the administrative waiting area, announce his presence, sign the visitor sign-in sheet, and obtain a visitor's badge. Davies usually visited the lunchroom, the hallway where the Union bulletin board was located, the hallway where the schedule was posted, outside the plant where employees smoked, the restroom, training room, and laundry room.[7] (Tr. 76–79.) Employee Carmen Ruiz Aguirre, one of six shop stewards at J&J, worked intermittently in the laundry room, which is located next to the Union bulletin board. (Tr. 63, 146.) At no time has any Union representative been permitted in production areas without management's supervision.

D. History of Theft and Resale of Product

Products that contain protein are subject to inspection by the United States Department of Agriculture (USDA). (Tr. 368.) About 12 or 13 years back, when ConAgra owned the plant, they had a policy of selling B-grade products, which did not meet specifications in terms of weight or size, to employees. (Tr. 462.) The product was placed in blue garbage bags and sold

[7] Olvera accessed the plant in the same manner as Davies.

to employees for $1.00 apiece. An inspector from the USDA saw some of the product being re-sold in a store. As a result, ConAgra got a non-compliance report for permitting unlabeled products to leave the plant for re-sale, in violation of USDA regulations.

E. The Quality Assurance Lab and Food Samples for Employees

Certain products are tested for quality assurance in the Respondent's quality assurance (QA) lab. Products come from two production lines, line 1 and line 2. Of the items produced on line 1, about 60–70 percent are simply thawed and eaten, with no requirement for the consumer to cook the items. The rest of the items from line 1 are considered baked items, and they are microwaved in a pre-packaged sleeve. The QA employees are able to inspect the baked items from line 1 by microwaving a unit to ensure the seams don't pop open and the color and integrity of the product are intact. After testing, samples from line 1 are put into pans designated as inedible, and then dumped into a hopper for collection by a local hog farmer. Line 2, the fry line, produces the pizza pockets. Until roughly 1-1/2 years prior to the hearing, Line 2 also produced fruit turnovers. It operates two or three times per week.[8] Each hour, a carton of eight units of the products from line 2 are taken to the QA lab and deep fried to ensure the seams don't pop open and the product's color and quality is up to par. (Tr. 446–447, 455–456, 470.)

With the exception of a 2–3 month period in early 2012, samples of the pizza pockets tested in the QA lab were placed on trays in the employee cafeteria about once an hour on days the production line was running. The samples, consisting of about 20–40 pizza pockets, were unpackaged, and available to employees on a first-come, first-serve basis. (Tr. 293–295.) The pizza pockets are sufficiently large to serve as a meal, and many employees relied on the samples for lunch. (Tr. 22–23, 293, 445.) If there was leftover product, employees could, upon request, take the cooked food home at the end of their shift. When this occurred, the food was placed in a carton with the requesting employee's name on it. (Tr. 46–47; Humble 447.)

Stephen McGuire has worked for J&J as an inventory specialist since 2011, and has served as a Union steward since 2006.[9] According to McGuire, frozen foods packaged in microwaveable bags were placed on trays in a refrigerator-freezer for employees to take at the end of the shift. (Tr. 22, 57.) The frozen food was also on a first-come, first-serve basis and employees could cook this food in the microwave in the cafeteria. The frozen food was potentially damaged, or was a partial case at the end of a production run. This occurred whenever the production line was running. (Tr. 40–42.) Adams, Ligon, and Humble recalled that employees were only provided with the cooked food from line 2 that was tested in the QA lab, and were not provided with frozen food or other food from line 1. (Tr. 280–281, 294–295. 375–376, 455.)

Garbage product refers to food that has been potentially contaminated on the floor. According to McGuire, with permission from the on-shift supervisor, employees could sometimes take garbage product. (Tr. 24.) Humble said garbage product was inedible, and would never be given to employees to consume. (Tr. 456.)

[8] In the past, line 2 was run every day, producing pizza pockets some days and fruit turnovers on others. Test products were provided to employees every day. (Tr. 470.)

[9] McGuire reports to Bob Rich, the warehouse manager.

Some product samples from each set of samples tested are labeled and retained in the QA freezer for a period of 12 months for comparison purposes in the event of a customer complaint. Retained samples were disappearing from the QA freezer in early 2012. In response, in February 2012, Rob Tiburino, the plant manager at the time, held a town hall meeting. He announced that because QA samples were taken from the freezer, he was putting new locks on the QA lab, and no product was to leave the plant. (R Exh. 11; Tr. 449–450.) He also temporarily discontinued the practice of permitting employees to eat the cooked food samples from the QA lab. (Tr. 28, 45, 48.) After a couple of months, the cooked food samples were again provided to employees.[10] (Tr. 48, 450–451.)

As of April 2014, the quality assurance lab retains one unit, and the rest goes to the hog farmer in the same manner as items from the line 1. (Tr. 443–445.)

F. March 2014 Meetings and Events

1. Revision of employee handbook

During the beginning of March, Davies and Schofield worked together successfully to revise the employee handbook. (Tr. 157–158; Jt. Exh. 7; GC Exh. 9.)

2. Grievance regarding terminations for alleged theft of product

J&J terminated employees Carlos Angel, Misael Vega, and Antonio Garcia for taking product from the production line. On January 31, Davies filed a step-2 grievance over these terminations. (R Exh. 6; Tr. 466.) The grievance was not resolved at step 2, so a step-3 meeting occurred on March 13. (Tr. 98, 100). Ligon, Humble, and Adams were present for J&J. Hawks and Davies were present for the Union. Police Officer Parker also was present at the beginning of the meeting. McCullough attended and took notes.[11] (Tr. 312.) Officer Parker walked them through what had happened with the three individuals and they viewed surveillance video documenting the incident.

After Officer Parker left, they discussed the grievance. Davies stated his belief the employees had permission to take product home, and were acting in accordance with an established practice. He said he saw employees take product every time he visited the plant. (Tr. 98, 100.) The Union presented a document signed by 68 employees, stating:

> We, the undersigned, state that it has been the general practice in Weston since J&J purchased the plant for employees to take product home. At times there has been a process requiring a signature or written permission. At other times there has been no signature required. Before our three coworkers were fired, no official policy or detailed expectations had ever been made clear or publicized. Nearly all employees have done this

[10] According to Humble, the practice of permitting employees to take food home in boxes stopped; According to McGuire it continued. (Tr. 48, 450–451.)

[11] McCullough's note-taking practice was to make very short notes during the meeting and then later type them up, usually the next day, and fill in the blanks. (337, 342.)

> at one time or another, and many have done so frequently. Supervisors have been aware of this practice, and some supervisors have also openly taken product home.

(R Exh. 7; Tr. 98.) Hawks asked Schofield if she had disclosed the practice that had existed, and mentioned that painting a false picture to the prosecutor was a felony. (Tr. 237–238.)

Though the grievance did not involve re-sale of any J&J product, the topic came up. According to McCullough, Ligon, and Humble, Davies said he knew for a fact supervisors were taking product and selling it. (Tr. 313, 370, 451.) According to Davies, he said he had heard rumors that in the past employees and supervisors had taken product from the plant and re-sold it, but he did not have direct knowledge. (Tr. 103, 106.) Ligon asked for names of these individuals, and Davies asked for the name of the individual who reported the alleged theft. (Tr. 370.) Neither Davies nor Ligon complied with the other's request. McCullough said there were two reasons management would not tell Davies who reported the alleged theft: they had it on video, and the Union was not willing to give the name of the supervisor taking and re-selling product.[12] (Tr. 313–314.) According to McCullough and Ligon, Davies refused to provide the information, stating the individuals were bargaining unit members and friends, and he didn't want to throw anybody under the bus. Davies claimed he did not comply with the requested information because he did not have direct knowledge of anyone re-selling product. He said that if he did he did have direct knowledge, he may or may not tell Ligon about it, because he had a relationship with individuals and may not want to throw them under the bus. (Tr. 106.) Davies did not explicitly say that he had only heard information about re-selling product as a rumor, nor did he mention it occurred before J&J owned the plant. According to Ligon, after the meeting, Hawks told Ligon he was going to have Davies turn the names of the individuals over to the district attorney. (Tr. 372–374.)

Ligon decided to terminate the three employees, based on the surveillance video and Officer Parker's investigation. (Tr. 369.) The prosecutor declined to charge the employees with theft.

Because of the comments made during the meeting about re-selling product, Humble talked to Ligon afterward and told him there might be an issue with the USDA. Humble contacted the USDA inspector, and the inspector told Humble that because there had been a violation when ConAgra owned the plant, another violation could cause J&J to lose its license to manufacture USDA products. (Tr. 374–375.). Humble told Ligon that J&J could get into a lot of trouble if this happened again, and showed him a regulation stating that two violations for having unlabeled food re-sold could result in the Secretary of Agriculture removing the plant's grant of inspection, which would render the plant unable to produce meat. Humble asked Steven Hilberg, the inspector in charge of J&J, and was told it did not matter that the first violation occurred when the plant was owned by ConAgra. (Tr. 451–453.)

As discussed directly below, this prompted Ligon to stop the practice of providing QA samples from the line to employees in the cafeteria.

[12] The employee was a bargaining-unit member and McCullough thought he would have been willing to come forward. (Tr. 315.) Ligon thought there may have been discussion about the employee wanting to remain anonymous, but was not sure. (Tr. 371.)

2. Cessation of food product samples

On March 14, J&J stopped placing QA sample food in the cafeteria. (Tr. 129.) Nobody at J&J notified the Union or bargained with the Union beforehand. The Union filed a grievance the same day.

3. Letter from Davies to Ligon and ensuing correspondence

On March 17, Davies sent Ligon a letter stating during a meeting with bargaining unit members the previous day, some morale issues were raised. Davies stated that Ligon never introduced himself to the employees and that the Union "demands an audience with you in which all hourly employees and I can participate." The letter outlined the following topics the employees wanted to discuss:

1) Unfounded threats of discharge, deportation, and disqualification by supervisors
2) Screaming and other disrespectful and intimidating treatment of employees
3) The invention and unequal enforcement of nonexistent rules and policies
4) A general decline of respect and dignity in the workplace
5) Rampant favoritism, despite the seniority system enshrined in the labor agreement
6) Increased line speed and decreased staffing beyond the point at which worker safety can be ensured.

(R Exh. 8.)

Attorney Fred D'Angelo responded to Davies' letter on March 18, stating that there would be no mass meeting with the employees, plant manager, and union officials. He directed Davies to address any issues with Schofield, and Ligon would sit in if he deemed it appropriate. D'Angelo further stated that Schofield had already addressed the topics Davies raised. Changing topics, D'Angelo next discussed employees taking product out of the plant and selling it, and said he was appalled Davies had not brought this to the Company's attention. D'Angelo instructed Davies to provide the names of the employees he had observed taking product from the plant and the individuals or institutions to which the employees were selling the product. He concluded by stating that the Company would not tolerate theft, and inviting Davies to address any questions to him directly. (R Exh. 9.)

Davies replied on March 19, stating that they would address any issues through the grievance process. He stated he was not aware of any theft from the plant, but instead was aware of an ongoing practice of employees taking product home. Davies opined that the practice was so widespread, he never made an attempt to recall or not who took product from the plant or consumed product in the plant. He stated he had heard different stories about employees re-selling product, but did not have any direct knowledge. He noted that the various versions of events occurred under a former owner, and the employees would know the facts better. Davies agreed that theft should not be tolerated, but stated that theft had not occurred. He stated that if the three employees were returned to work, the misunderstanding could be resolved by promulgating a clear rule and implementing it going forward. Davies concluded that he would await the plant manager's step-3 response and weigh the options. (R Exh. 9.)

On March 20, Schofield sent Davies a letter regarding the March 14 grievance over the discontinuation of placing QA sample food in the lunchroom. (CP Exh. 1.) She reiterated comments Davies made at the March 13 meeting, stating that Davies said he saw employees steal product every time he is in the plant and that he knew of employees selling stolen product outside the plant. She said that his refusal to provide names made him an accomplice. She informed him that, because of USDA regulations prohibiting the re-selling of product, the Company could lose its grant of inspection if this practice continued. She continued, stating, "Therefore, the moment you notified us that our product was leaving the premises without permission and the proper USDA inspection, we had to stop providing the QA samples to the employees." She denied the grievance, asserting that no violations of the contract had been committed.

G. Request for Information about Unit Members

Davies sent Schofield an email the morning of March 19, asking for an updated list of bid holders and qualifications, including seniority and addresses. He copied Maria Garcia, human resources generalist, on the email. He also requested the shift preferences for "bracket 6" employees, who were new hires. Under article 10.6 of the collective-bargaining agreement, they could express shift preferences annually in January, and shifts were awarded by seniority. In addition, he asked for the line preferences of "bracket 5" employees, i.e. packer/general laborers. (Tr. 113–114; Jt. Exh. 10; Jt. Exh. 2, p. 10.) Schofield responded by email that afternoon, informing Davies she was providing the employees the following attached form:

> To all Employee's (sic):
>
> The Union is requesting your up-to-date personal information. In the interest of your privacy we would like you to fill out what you would like to share with Teamsters Local # 839 and Mr. Rich Davies. If you do not want your information shared, please print your name and check the box. Please also take this opportunity to inform us of your shift preference. Your preference is no guarantee of that shift. Shifts will be awarded per 10.6.
>
> **Please Print**
>
> Name:_____ ☐ I DO NOT WISH TO SHARE MY INFORMATION
>
> Street Address:_____
>
> City:_____
>
> State:_____
>
> Zip Code:_____
>
> Home Phone:_____
>
> Cell Phone:_____
>
> Message:_____

Shift Preference___DAY___SWING___3rd_____

Schofield told Davies she would forward him the information she received from employees. She also would provide an updated list of bid holders and qualifications along with a seniority list the following day.[13] Davies perceived that the Company was trying to turn members against the Union by asking members permission to release information to the Union instead of giving the information directly to the Union. (Tr. 118–119.)

The morning of March 20, Davies sent Garcia an email stating that Schofield had sent him the addresses, phone numbers, qualifications, bid awards, and seniority list for all employees, and stated the Union was entitled to that information to police the agreement. Garcia responded that she gave Schofield the information to send to him, but expressed concern about sharing employees' personal data with the Union. She stated that Davies gets the same information on the Union's sign-up sheet when employees become members of the Union, and suggested that someone keep a spreadsheet with this information. Garcia expressed that she assures employees their personal information is kept private, and said she was putting herself "in a spot" sharing it with Davies without their personal approval. Davies replied, "Listen. We have a labor agreement, and are covered by laws that make us entitled to the information. Any time I don't get it after requesting it we will file charged (sic) with the Board." (R Exh. 10.)

The email exchanges continued, and on March 21, Davies informed Garcia he would be investigating unfair labor practice charges about the releases sent to employees. Garcia responded that she was confused by his attitude, asked if everything was an unfair labor practice to him, and stated that she was simply trying to ensure he had the best information possible. Davies replied that there was more going on than Garcia understood, and said he would deal with those above her. He again expressed that the Union was entitled to the information, and that the release sent to employees was an attempt to turn the members against the Union.

Schofield responded on March 24, asking Davies to show her where in the contract it said he had the right to request information about members from the employer rather than from the employees directly. She said the Company does not release information to anyone without the employees' authorization, including the Union. She echoed Garcia's statement that Davies receives this information directly from the members and that it was his responsibility to update it. Schofield said that, on the advice of J&J's attorney, she sent a memo to employees asking permission to provide the Union with their phone numbers. She invited Davies to show her where in the contract it stated she was required to do more. Finally, she stated that this was not an attempt to turn members against the Union, and opined that this was another example of her trying to foster a positive working relationship and Davies replying with animosity and threats. (Jt. Exh. 6.)

H. April Grievance Meetings

On April 10, Davies met with Schofield and Sandy McCullough for a step-2 grievance meeting regarding six grievances.[14] Davies took notes during the meeting, and McCullough

[13] Most employees permitted the information elicited to be shared, but some did not. (Jt. Exh. 6.)

[14] McCulough testified the meeting was to discuss eight grievances and her notes say seven. (Tr. 315; R Exh. 17.) I rely on Davies' contemporaneous notes that reflect discussion of six grievances.

wrote a summary of the meeting afterward. (GC Exh. 3; R Exh. 17.) Schofield said the Union knew the Company's position, so she was not certain what they were doing there. (Tr. 316.) They resolved the first two grievances.[15] The third grievance involved ingredient-maker Angel Urincho, and it was written in Spanish. Davies questioned the accuracy of the translation. Schofield said she had checked the translation with somebody in her office and a couple of supervisors, and she was confident it was correct. Davies said he was qualified too because he had studied Spanish at college, worked as an interpreter, and had published several articles in Spanish. He said he was not going to discuss the Spanish translation issue with someone who was monolingual. (Tr. 81–82, 141, 172, 182.)

According to McCullough, Davies "attacked" Schofield, asked her why she had to be so ugly and mean, told her she did not know how to do her job, and called her a "monolingual idiot" or something to that effect. At some point, Davies started to stand up, and was flailing his arms. After a while, Schofield stuck up her hand and said, "That's enough," and Davies calmed down. (Tr. 316–317; R Exh. 17.)

At one point Schofield stated that the Company was just trying to keep its doors open, which to Davies implied that the Union was putting the plant in jeopardy by enforcing the agreement and filing grievances. Davies testified, "I said something to the effect that I would rather see the plant—let's see here . . . ."[16] (Tr. 142.) He then elaborated about how he told her employees were not very happy and they felt they did not know Schofield or how to reach her. Davies also said it was not good to have an anti-union anti-employee employer. (Tr. 143.) At one point in the meeting, Schofield said she was going to contact Harry Fronjian, the Company's corporate human resources official. Davies responded, "That's fine, I know Harry, and be sure to tell him what an ass Fred D'Angelo was when he called me regarding the selection of arbitrators for this arbitration." (Tr. 155, 320.) Davies believed D'Angelo, an attorney representing J&J, was trying to get Davies to drop a grievance. During the call Davies referenced, D'Angelo told him, "You obviously don't do relationships," and hung up the phone on him. (Tr. 156–157.)

In McCullough's experience dealing with Davies over the years, it was uncharacteristic of him to behave the way he did during the meeting. (Tr. 345–346.) McCullough did not see Davies threaten Schofield with violence during the meeting or at any point. (Tr. 335–336.)

McCullough wrote a summary of the meeting a day or two after it occurred. She wrote that Davies repeatedly told Schofield she was unqualified to do her job, commented about the fact that she did not speak Spanish, and talked about his degrees and how much he knew. She recalled, "Without calling her stupid he called her stupid and unable to perform her job." McCullough noted Davies' comments about the employees not knowing Schofield, and voiced her disagreement. She also expressed her opinion, by way of some examples, that Davies acted in an unconstructive manner during the grievance discussions, and commented that he didn't care

[15] McCullough recalled they did not resolve any grievances, but Davies' contemporaneous notes reflect otherwise. (Tr. 316, 334.)

[16] Davies denied making comments about seeing the plant close forever. As discussed below, I find he made such a comment. (Tr. 83.)

if he got the place shut down. She concluded her comments by opining that Davies was out of control and was filing grievances just to harass the Company. (R Exh. 17.)

On April 15, D'Angelo sent Davies a letter advising him that his conduct toward Schofield on April 10 would not be tolerated. The letter referenced Davies calling Schofield names, calling her a liar, and stating that he would rather see the plant close forever. D'Angelo warned that further mistreatment of management would not be tolerated, and would result in his removal from the facility. (Jt. Exh. 5.) Hawks received a copy of the letter as an email attachment. This was the first time he had heard a complaint about Davies' behavior. (Tr. 187–188.)

On April 22, 2014, there was a step-3 meeting over the alleged unilateral change to product sampling. Schofield, McCullough, and Ligon were present for management; Hawks and Davies were present for the Union. Davies took notes. Ligon reminded Hawks that he had agreed to tell the district attorney what he knew about product being re-sold. Hawks stated he said no such thing, and that the Union provided the prosecutor with the same information it provided to the Company. He told Ligon not to twist his words, and reminded him, "We do this for a living." Hawks asked Davies where Ligon was from, and Davies responded that Ligon was part of the Hostess debacle.[17] According to Davies' notes, Hawks then said:

> In my experience, there's two types of management: those who can manage and those who can't. The first kind manages and usually has good relations with us. The second kind resorts to intimidation, coercion, and abuse, which typically extends toward their wives, families, and dogs too. Which kind are you? [18]

(R Exh. 18.) Ligon responded, "Thanks for the lesson. Have you ever run a plant?" The meeting concluded without the parties discussing the grievance.

At this point Ligon noticed a change in the relationship between the Company and the Union. (Tr. 378.)

I. Changes to Davies' Access and Ban from Facility

On April 22, Davies visited the facility. After he had been in the plant for awhile, he received an email from Ligon with a letter attached. In the letter, Ligon stated that, due to Davies' violation of the collective-bargaining agreement, it was necessary to clarify the procedures for his future visits to the plant. Ligon instructed Davies to provide him with 24 hours advanced notice of his arrival and the purpose of his visit. Ligon further instructed Davies to ask for him or Schofield when he arrived, and they would sign him into the plant. He further instructed Davies to limit his visits to the plant's administrative hours. Davies was told to confine his visits to the cafeteria area, and Ligon instructed that all other areas were considered work areas, namely the laundry room, training room, and the hallway where employees clock in

[17] Ligon worked at Hostess prior to J&J. There were well-documented and long-term labor tensions and Hostess ultimately went into bankruptcy. (Tr. 406.)

[18] This is consistent with Ligon's recollection of what Hawks said. (Tr. 384.) Hawks recalled saying something similar to this, but not these exact words. (Tr. 215–216.)

and out. Finally, Ligon asked Davies to limit the duration of his visits to a respectable amount of time, pointing out that the cafeteria is not to be used as a union hall. (Jt. Exh. 4.) Davies did not receive advance notification about these changes and the Company did not bargain over the changes. (Tr. 79, 190–191, 396–397.)

Ligon and Davies saw each other later that day. Davies reminded Ligon that they had a longstanding practice of visitation, and Ligon said, "My comment is good." (Tr. 389.)[19] Davies told Ligon he would be hearing from the Union's attorney, and said he would enter the plant whenever he chose. Ligon responded that he would have Davies removed. (Tr. 388–389.) According to Davies, he asked Ligon why he had to be so unpleasant, and Ligon responded, "You really tore that little girl's ass." (Tr. 72–73.) Ligon recalled saying, "You really dressed that little girl down." (Tr. 389.) When Davies asked who Ligon was referring to, he replied Schofield. Davies said Schofield was lying, and Ligon responded, "Everybody is a liar but you Rich." (Tr. 73, 390.) Davies then said, "What an Ass." (Tr. 73.) Davies left the plant, called his wife, and at her suggestion went to Dairy Queen to have a Blizzard. He also called Hawks and reported what had occurred. (Tr. 75–76.)

At 3:19 p.m. on April 23, Attorney James Sullivan sent Hawks an email instructing him to provide any information the Union had regarding employees taking unauthorized product from the plant and re-selling it. (R Exh. 14.) Hawks did not have any information, so he did not respond. (Tr. 223.)

At 6:03 p.m. the same day, Davies sent Ligon an email and attached a letter protesting and disagreeing with the change in Davies' access to the plant. Davies noted that he entered the plant the previous day in the same manner he had entered the plant hundreds of times in the past. He pointed out that there was no requirement in the collective-bargaining agreement for 24-hours' advance notice, and that the term "working hours" had previously been interpreted as any time there were members working at the plant. Davies further stated that union representatives have always met with employees in the training room, hallways, and laundry room. Finally, he noted that the collective-bargaining agreement does not specify the length of the Union's visits, and the Union's practice has been to conduct relatively lengthy visits that straddle shifts. (GC Exh. 2.)

At 7:10 p.m., Sullivan sent an email to Hawks regarding Davies' actions the previous day. Sullivan reported that Davies called Schofield a liar, and got into a loud shouting match with Ligon, chased after him, and called him an ass. The email further stated that Davies said he could enter the plant whenever he wanted, with no notice to the Company. Sullivan told Hawks that Davies was no longer permitted to visit the plant, and informed him that any attempt would be considered trespass. He instructed Hawks to appoint another representative and to respond directly to him. (GC Exh. 4.)

On April 24, Gerard Law, J&J's senior vice president, sent a letter to all employees telling them that the Company had informed Davies he was no longer permitted on the premises. Schofield and Garcia placed a copy of the letter in each employee's mailbox. The letter stated that any attempt by Davies to visit the plant would be considered trespass. Law further conveyed

[19] The transcript incorrectly uses "as" instead of "is" in this sentence.

that Davies continued to treat administrative staff in an unprofessional manner, refused to address Schofield by her name, and referred to her as a liar and idiot. He then discussed the alleged theft, and asserted that Davies was concealing information. Law told the employees that, on March 13,when Davies was told that employee theft could cause J&J to lose its license and close down, Davies said he would "'*rather see this place close forever*' than cooperate with the company on its efforts to run the plant safely and efficiently because those efforts were making employees 'unhappy.'" (Emphasis in original.) He added that Davies said it was "*better to have employees that are out of work than employees who are 'unhappy*'" (Emphasis in original.) Law then stated that both Davies and Hawks, following a warning, continued to engage in "unprofessional, shocking, and disgraceful behavior during a grievance meeting" the preceding Tuesday. The letter stated that the Company asked the Union to appoint a different individual to represent the employees. Law told the employees that whether the Union granted the request was up to them because only the employees and their bargaining representative could decide who will bargain on their behalf. He stated, nonetheless, that the Company had the right to refuse to meet and bargain with an individual who behaves as Davies did by his continued insults, obscenities, and defamatory statements. Law expressed the Company's viewpoint that Davies' behavior had created so much ill will that good faith bargaining had become impossible with him as the employees' spokesman. The letter concluded by assuring employees they would not want to be treated the same way Davies had treated Schofield, Ligon, and other members of the administration, and thanking them for their service, and instructing them to contact HR with any questions. (Jt. Exh. 11.)

On April 25, after speaking with Davies, Hawks responded to Sullivan's April 23 email. He denied the Company's factual assertions and rejected the position that Davies was not fit to serve as the bargaining unit's representative. Hawks stated that Davies remained the designated representative for the bargaining unit employees at J&J, and that the Union would not tolerate the Company's interference with the Union's internal affairs. Hawks notified Sullivan that, in addition to Davies, business representatives Jaime Olvera and Russell Shjerven, as well as himself, would be representing the bargaining unit and making periodic trips to J&J. Hawks asserted that Ligon and Schofield were hostile and aggressive toward him and Davies at the April 22 meeting, and stated they must cease and desist from engaging in hostile communication with the Union. He instructed Sullivan to direct any further communication to John Lee, the Union's attorney. (GC Exh. 6.)

On April 30, Olvera posted a notice from Davies on the Union bulletin board. It informed the employees that management's statements about his behavior were untrue, and that the Union had responded by filing charges against management alleging labor law violations. The notice informed employees that Davies was still their business representative, and informed them that management lacks the right to choose their representative. He concluded by asking the employees to contact him or a shop steward with any questions. (GC Exh. 7.)

Sullivan wrote a grievance letter to Hawks on May 6, 2014, asserting that Davies had violated article 2 of the collective-bargaining agreement by engaging in unprofessional, obscene, and harassing conduct toward management. The grievance further alleged that Davies refused to inform management of the names of employees who had stolen product from the plant and re-sold it. He requested that the grievance be expedited to arbitration. (R Exh. 13.)

J. June 5 Meeting

On June 5, there was a grievance meeting regarding employee Tom DeLay.[20] Hawks and Olvera were present for the Union. Ligon, McCullough and Adams were present for the Company. (R Exh. 16.) Olvera, at one point, told Ligon that the plant wasn't a plantation, Ligon wasn't in Florida anymore, and things were different here. (Tr. 269, 288.) Hawks brought up Ligon's history at Hostess, and Ligon said he was "fixin" to stop the meeting. Hawks proceeded to make fun of the term "fixin" by rhetorically and repeatedly asking what it meant.

III. DECISION AND ANALYSIS

A. Credibility Legal Standards

A credibility determination may rest on various factors, including "the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole." *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op at 7 (2014), citing *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness's testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950).

Where there is inconsistent evidence on a relevant point and resolution turns on credibility, my credibility findings are incorporated in context into my legal analysis below.

B. Allegations Regarding Davies' Access to Facility

Complaint paragraph 6(a) alleges that Law told employees that an authorized representative of the Union was no longer permitted on its premises pursuant to a union access provision in the collective-bargaining agreement, and threatened employees that it would consider any attempt by the representative to enter the premises to be trespass, in violation of Section 8(a)(1) of the Act. Paragraph 8(b) asserts the related allegation that the Respondent, since about April 23, 2014, has failed and refused to recognize Davies as the Union's representative for purposes of representing bargaining unit employees, in violation of Section 8(a)(5) and (1). Finally, paragraph 9(c) alleges that on about April 23, 2014, the Respondent banned Davies from the facility, in violation of Section 8(a)(5) and (1). Because these allegations turn on the same set of facts and are inextricably intertwined, they are analyzed together.

In *United Parcel Service*, 330 NLRB 1020 fn.1 (2000), the Board stated:

> It is well settled that the Act bestows on employees, unions, and employers alike the right to select representatives of their choice for collective bargaining and grievance

[20] This meeting occurred after the time period relevant to the allegations before me. The substance of the meeting is not material, but I have included comments made at the meeting because they go to credibility, as detailed infra.

> adjustment and imposes a concomitant obligation to deal with each other's chosen representatives absent extraordinary circumstances.

See also *Battles Transportation, Inc.,* 362 NLRB No. 17 fn. 3 (2015). "The selection of an employee's representative belongs to the employee and the union, in the absence of extenuating circumstances…" *Barnard College.*, 340 NLRB 934, 935 (2003), citing *In re Anheuser-Busch, Inc.*, 337 NLRB 3 (2001), enfd. 338 F.3d 267 (4th Cir. 2003), cert. denied 541 U.S. 973 (2004), *and Pac. Gas & Electric Co*., 253 NLRB 1143 (1981). "Inherent in the very nature of the rights guaranteed by Section 7 is the concomitant right of full freedom from employer intermeddling" in this choice. *Dal-Tex Optical Co*., 130 NLRB 1313, 1319 (1961). "Employees have as clear a right to organize and select their representatives for lawful purposes as the employer has to organize its business and select its own officers and agents." Id.

Threats to exclude union agents from the workplace have been held to violate Section 8(a)(1). *Swardson Painting Co*., 340 NLRB 179 (2003). It follows, of course, that actual exclusion of a union representative may also violate the Act. In *Frontier Hotel & Casino,* 309 NLRB 761 (1992) enfd. in relevant part *NLRB v. Unbelievable, Inc.*, 71 F.3d 1434, 1438 (9th Cir. 1995), the Board affirmed the ALJ's finding that ejection of union representatives from the hotel's premises interfered with union-related communications and coerced employees in violation of Section 8(a)(1) of the Act. Id. at 766; see also *ABF Freight System, Inc.,* 325 NLRB 546, 562 (1998).

In the present case, Davies was not only expelled from the premises, his expulsion was announced to all employees through dissemination of a letter from a high-ranking official. Moreover, employees were told the Company viewed any attempts by Davies to enter the facility as unlawful trespass. The impact on Section 7 rights was magnified by this public and, as discussed below, disparaging means of informing employees that they were being denied access to their representative.

The letter, admittedly drafted after consultation with legal counsel, sets forth a reason for Davies' expulsion, which dovetails with the defense the Respondent argues here. Law's letter states, in relevant part, "Unfortunately, at this stage, Mr. Davies' continued insults, obscenities, and defamatory statements have *Sage Development Co* created so much ill will in the relationship between the parties that good faith bargaining is now impossible with him acting as your spokesman." (Jt. Exh. 11.)

The Board has held that an employer may not refuse access to a union representative absent "*persuasive evidence* that the presence of the particular individual would create ill will and make good-faith bargaining impossible." *KDEN Broadcasting Co*., 225 NLRB 25, 35 (1976); *Pan American Grain Co*., 343 NLRB 205, 206–207 (2004)(Death threat against company president). The inquiry is fact-intensive, and, because it is a defense, the employer bears the burden of persuasion. *Marydale Products Co*., 133 NLRB 1232 (1961); *Sage Development Co*., 301 NLRB 1173, 1189 (1991)(It is well-established that burden of proving affirmative defense rests with the party asserting it).

In *Sahara Datsun*, 278 NLRB 1044 (1986), the Board found that refusal to deal with a particular individual may be justified when there was an unprovoked physical assault and

unsubstantiated allegations to the affect that the company's owners had committed various crimes. By contrast, in *Long Island Jewish Medical Center*, 296 NLRB 51, 71 (1989), the Board held that the employer violated the Act by barring a union representative from its premises after he lightly pushed a female manager, called her an "asshole" repeatedly, and blocked her from getting out from behind her desk for a short period. Likewise, in *Victoria Packing Corp*., 332 NLRB 597 (2000), a union representative engaged in a shouting match with the company's president, then "got up very close to [his] face, and while pointing his finger, yelled 'I'm going to get you and you[r] fucking company." Id. at 599. The administrative law judge, who was upheld unanimously by the Board, stated that the conduct was not "so egregious and beyond the pale as to make the bargaining process itself untenable," and stated that "[f]or better or worse, the obligation to bargain also imposes the obligation to thicken one's skin and to carry on even in the face of . . . rude and unacceptable behavior." Id. at 600.

The first conduct alleged by the Respondent to justify Davies' removal occurred during the April 10 grievance meeting detailed above. There are some credibility disputes regarding what, precisely, Davies said. I note that even if I credited the Respondent's version of events, I would not find Davies' conduct egregious enough to justify his removal. Nonetheless, I will turn to the disputed facts and resolve them. Much was made of Davies allegedly referring to Schofield as a "monolingual idiot." Davies denied making this precise comment. I credit Davies on this point for a couple of reasons. First, Schofield did not testify, and I therefore draw an inference that her testimony would not be favorable to the Respondent.[21] The Respondent relies on the only other person who was present at the meeting, McCullough. Her summary of the meeting, however, does not contain this term, and states, "Without calling her stupid he called her stupid and unable to perform her job." This implies he did not use the word "idiot," an express statement of stupidity. She also did not recall Davies' precise words when she testified.[22] The summary was written at a time when the events of the meeting were fresher in McCullough's mind, and I therefore find them more reliable than her testimony. McCullough's testimony was often confused with regard to the various meetings. (Tr. 321–325.) As to this meeting, her testimony that she thought they discussed Angel Urincho's grievance first is contradicted by Davies' contemporaneous notes, which I find reliable. For all of these reasons, I decline to find that Davies referred to Schofield as a "monolingual idiot."

Davies admittedly said he may have referred to Schofield as monolingual, and I do not doubt that he made comments about his superior Spanish skills. Likewise, given the context was a grievance meeting, I have little doubt that Davies made comments calling into question Schofield's competency, asserting his own superiority, and telling her she was incorrect on various points. McCullough's unrefuted testimony is that this behavior was uncharacteristic of Davies, and it stopped when Schofield put her hand up, leading Davies to realize he had gone too far.

[21] The Board has agreed that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988). Though Schofield was no longer employed at the time of the hearing, there is no evidence to show what, if any, attempts were made to subpoena her, or whether securing her testimony would have presented logistical difficulties.

[22] Her testimony was Davies said, "'You are absolutely a monolingual idiot' or something to that effect." (Tr. 317.)

The Respondent asserts that Davies asked Schofield why she had to be so ugly and why she had to be so mean. This is based on McCullough's testimony about the meeting. These alleged comments are absent from McCullough's more contemporaneous summary about the meeting. The same holds true for McCullough's testimony that Davies called Schofield a liar. Her notes do not reflect such a comment, and her testimony was not convincing. The relevant exchange went as follows:

> Q. Did he [Davies] ever call her a liar?
> A. Yes, repeatedly. You don't know what you're talking about. You—what you're saying is not correct. You're not telling the truth. You're lying.
> Q. About what? Do you remember?
> A. By that time he was—he was really off of the whole thing because like I said. We never talked about the grievances. We never even got past the usage sheet. So essentially anything that she has to say because she didn't translate the grievance correctly.

(Tr. 319.) As noted above, Schofield did not testify about the meeting. I find the evidence is unclear as to what, precisely, Davies said when he and Schofield were arguing about the Urincho grievance.

Moreover, Davies' reference to D'Angelo as an "ass" is not sufficiently egregious to remove him as the Union's representative.[23] *Long Island Jewish Medical Center,* supra. Here, Davies' "choice of language, while strong and perhaps intemperate, was not so offensive, flagrant, violent, or extreme as to render him unfit for further service." *Transcon Lines*, 235 NLRB 1163, 1165 (1978); see also *Dreis & Krump Mfg., Inc.,* 221 NLRB 309 (1975).

The Respondent relies on Davies giving Schofield the cold shoulder and referring to Schofield as "she" and "her" to assert that Davies harassed Schofield.[24] This evidence comes in part from McCullough's very confused testimony, unsupported by her meeting notes.[25] One of the meetings she discussed in her testimony occurred on June 5, after Davies had already been barred from the facility. When discussing the April 22 meeting, which directly preceded Law's letter and the expulsion of Davies from the facility, McCullough was initially unable to recall if Olvera was present for the Union, and thought Schofield was not there; In fact, Olvera was not there and Schofield was. (Tr. 321–325; R Exh. 18.) Moreover, she stated that Davies pointed out that Ligon was part of the Hostess debacle, prompting Ligon to say he was "fixin" to stop the

[23] The Respondent asserts that this comment was made with the intent to poison the bargaining relationship. Davies unrefuted testimony was that he made the comment in an attempt to generate a call from Fronjian to him because he was concerned about the relationship between the Union and the plant, and he thought Fronjin might also be concerned. (Tr. 156.) Regardless of intent, however, the comment was not sufficiently egregious to make good faith bargaining impossible.

[24] The Respondent points to cases involving gender discrimination under Title VII of the Civil Rights Act of 1964. (R Br. 7, 9.) This reliance is misplaced, as the Board lacks jurisdiction to determine the merits of a Title VII gender discrimination claim. In any event, whether it's labeled as alleged gender-based harassment or not, Davies' conduct did not violate the Act under the standards the Board applies.

[25] I do not find McCullough was intentionally trying to be untruthful, but instead observed that she was nervous and confused.

meeting, and in turn prompting Hawks to mock Ligon about his choice of language. She also said this was the same meeting where Hawks referred to two different types of managers and the comments about the plantation. (Tr. 325–326.) Her notes, however, belie that these events occurred in the same meeting. First, McCullough's notes from the April 22 meeting are not part of the record, even though she testified she was present as a note-taker. (Tr. 323.) Davies' notes are in the record, and I therefore credit his contemporaneous version of what occurred, which is supported by his testimony, and generally corroborated by Hawks' testimony. (R Exh. 18.) His notes do not reflect Ligon making the "fixin" comment, Hawks responding to any such comment, or any comments regarding a plantation. According to McCullough's notes, the "fixin" comment and ensuing mockery of it took place on June 5, during a meeting Davies did not attend, after he had been barred from the facility. The same holds true for the comments about the plantation. (Tr. 325–326, 329; R Exh. 16.)

Ligon also was somewhat unclear on the timing and substance of the various meetings. He testified that the meeting where Hawks made his comment about the two types of managers concerned theft and occurred in March or early April. The record shows, however, that this comment was made at the April 22 step-3 meeting about the discontinuation of product samples. As noted, McCullough's notes regarding the April 22 meeting were not entered into evidence. Ligon's testimony that Schofield presented the Respondent's case, without any explanation of her presentation's topic or substance, is outweighed by Davies' notes and the supporting testimony that J&J did not put on its case at this particular meeting. (Tr. 378–379; R Exh. 18.)

In short, the only reliable evidence of Davies acting rudely toward Schofield comes from testimony and notes about the April 10 meeting. McCullough's testimony of what occurred on April 22 is simply too confused to be considered reliable, and Ligon's version of the topic and timing of the meeting is likewise uncertain. The Respondent also asserts that Davies "stared" at Schofield, but the only evidence regarding staring involves Ligon's testimony that Hawks asked if he and Schofield were having a staring contest during a meeting about theft on an uncertain date.

The Respondent contends that Davies' conduct toward Ligon, coupled with his treatment of Schofield, justified his removal from the plant. Davies admittedly called Ligon an "ass" on April 22. The other conduct attributed to Davies is his mocking of Ligon's Southern heritage. The evidence is clear, however, that the comments about "fixin" to end the meeting and the plantation took place on June 5, during a meeting Davies did not attend. Finally, the Respondent asserts Davies denigrated Ligon's work performance. With regard to Davies calling Ligon an "ass" and referencing his time working for Hostess, I find these are not egregious enough, even when coupled with the comments and behavior directed at Schofield, to warrant Davies' expulsion from the property. Moreover, as the General Counsel points out, Davies called Ligon an "ass" in response to Ligon's unilateral change to Davies' access, and therefore the Respondent cannot justify its decision to refuse to recognize Davies on this comment. *Long Island Jewish Medical Center*, supra at 72.

The Respondent cites to *CBS, Inc.*, 226 NLRB 537, 539 (1976), to argue that Davies' pattern of harassing, discriminatory, and hostile conduct presented a "clear and present danger to the bargaining process or would create such ill will as to make bargaining impossible or futile." (R Br. 10.) That case, however, involved a conflict of interest regarding the composition of a

bargaining committee because one of the committee members was part of a labor organization that did not represent CBS's members, but represented its two key competitors, NBC and ABC. Such a scenario is not present here.

All told, the record does not contain persuasive evidence that Davies' presence would create ill will and make good-faith bargaining impossible. Moreover, it is undisputed that no bargaining occurred before the Respondent refused to recognize Davies as the Union's representative and barring him from the premises. Accordingly, I find that the Acting General Counsel has met his burden to prove that Respondent threatened employees' Section 7 rights by sending the message that the person charged with administering their collectively bargained rights was no longer allowed inside Respondent's facility, and would be viewed by the Company as breaking the law by trespassing if he tried to come to the facility. I further find the refusal to recognize Davies and his expulsion from the premises interfered with the employees' Section 7 rights. I therefore find that, by the conduct alleged in complaint paragraph 6(a), Respondent violated Section 8(a)(1) of the Act, and by the conduct alleged in paragraphs 8(b), and 9(c), the Respondent violated Section 8(a)(5) and (1) of the Act.

B. Promises of Increased Benefits and Improved Terms and Conditions of Employment

Subparagraphs 6(b)–(d) of the complaint assert that the Respondent, by the letter Law sent on April 24, 2014, denigrated and disparaged the Union in order to undermine its employees' support for the Union, encouraged employees to abandon support for the Union, and promised, by soliciting employee complaints and grievances, its employees increased benefits and improved terms and conditions of employment if they abandoned support for the Union and its authorized representative, in violation of Section 8(a)(1).

"Words of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1)." *Sears, Roebuck & Co*., 305 NLRB 193 (1991). An employer, however, may violate the Act when it denigrates the union in the eyes of employees. See *Lehigh Lumber Co*., 230 NLRB 1122 (1977). The employer's freedom under Section 8(c) of the Act to disparage, criticize, or denigrate the Union stops when the comments threaten employees or otherwise impinge upon Section 7 rights. *Children's Center for Behavioral Development*, 347 NLRB 35 (2006). In *NLRB v. Gissel Packing*, 395 U.S. 575, 617 (1969), the Supreme Court stated:

> [A]ny balancing of the employer rights of free speech and the rights of employees to be free from coercion, restraint, and interference must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.

To begin with, I find the letter misrepresents and/or exaggerates much of what occurred. The comment attributed to Davies about the plant closing did not, even by the Respondent's own witness' account, take place in the context of discussing the USDA licensing, as stated in Law's letter. The meeting where Davies made a comment of this nature was an April 10 meeting about grievances that had nothing to do with the theft and re-selling of product and its impact on the Respondent' s USDA license. (R Exh. 17.) Moreover, Davies' alleged statement that he would

rather see the plant "close forever than cooperate with the company on its efforts to run the plant safely and efficiently because those efforts were making the employees unhappy" goes beyond misrepresentation to fabrication. Neither McCullough's after-the-fact notes nor her testimony tie Davies' comments to either the USDA licensing or attempts to run the plant efficiently. As noted, Schofield, the only other person present at the meeting where the comment was alleged, did not testify.

McCullough's notes and Davies' testimony, read together, present the most plausible context for this statement. Davies testified that Schofield made some comments in the April 10 meeting to imply the Union's grievances and unfair labor practice charges threatened the plant's viability. McCullough's notes reflect Davies threatening to file charges over an information request. The notes then digress into McCullough's opinion about Davies' motives and his constant threats to file unfair labor practice charges. In the following paragraph, the notes reflect Davies stating he didn't care if he got "this place" shut down. (R Exh. 17.) Taken together, I find there was a disagreement between Davies and Schofield about the request for information regarding Urincho's grievance. From the content and tone of McCullough's notes, it is apparent the disagreement morphed into something broader than this one information request. Specifically, the preponderant evidence shows that Davies and Schofield had a disagreement over the Respondent's perception that the Union was harassing the Company with baseless requests and complaints, and the Union's perception that it was representing its members and it would continue to do so regardless of how it was perceived. Given Davies' testimony, referenced above, where he stated "I said something to the effect that I would rather see the plant —let's see here . . . ," I find he made a comment about the plant closing down.[26] I also find it was part of a robust exchange between him and Schofield about whether the Union was using the grievance process frivolously and threatening unfair labor practice charges disingenuously.

Law's letter also contains other misstatements and mischaracterizations. As noted above, the evidence fails to establish that Davies explicitly called Schofield an "idiot" or a "liar." Law further cast blame on Davies for the Respondent's unilateral changes to his plant access by stating that Davies "refused to provide the company even the common courtesy of notifying management when he arrives at the plant." I find these misstatements and half-truths denigrated Davies in the eyes of the Union's members and undermined their support of their collective-bargaining representative.

The most transparently false aspect of the letter is Law's assurance to employees that it was their choice who they chose as their bargaining representative. This assurance of free choice was quickly rendered illusory by Law's immediate successive statements that: (1) the Company could refuse to bargain with a representative who behaved offensively, (2) Davies had behaved offensively, and (3) bargaining with Davies was now impossible. Law concluded by thanking the employees for their dedication, and directing them to contact certain individuals in human resources with any questions, assuring employees that they would make every effort to find an answer or solution. The letter was clearly aimed at "disparaging and discrediting the statutory

[26] When he stopped himself in his testimony, he proceeded to ramble somewhat off point, which undermines his credibility about this statement. Though I do not credit his denial of making a comment about closing the plant down, I do not find his overall testimony lacked credibility. *NLRB v. Universal Camera Corp*., supra.

representative in the eyes of its employee constituents, to seek to persuade the employees to exert pressure on the representative to submit to the will of the employer, and to create the impression that the employer rather than the union is the true protector of the employees' interests." *General Electric Co*., 150 NLRB 192, 195 (1964), citing *NLRB v. Herman Sausage Co*., 275 F.2d 229, 233 (5th Cir. 1960), and *NLRB v. Fitzgerald Mills Corp*., 313 F.2d 260, 268 (2d Cir. 1963); see also *American Meat Packing Corp.*, 301 NLRB 835, 839 (1991); *Hospital Shared Services, Inc*., 330 NLRB 317 (1999); *Advanced Architectural Metals*, *Inc*., 351 NLRB 1208 (2007).

The Charging Party further argues that the Law's letter constituted direct dealing, in violation of the Act. The Board's criteria for establishing unlawful direct dealing are: "(1) the [employer] was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining; and (3) such communication was made to the exclusion of the Union." *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000), citing *Southern California Gas Co*., 316 NLRB 979 (1995). In the instant case, Law communicated directly with unit employees, for the purpose of undercutting Davies' role in bargaining, to the exclusion of the Union.

Based on the foregoing, I find the General Counsel and Charging Party have established the allegations set forth in paragraph 6(b)–(d) of the complaint.[27]

C. Alleged Direct Dealing

Complaint paragraph 7 alleges that the Respondent violated Section 8(a)(5) and (1) when Schofield bypassed the Union and dealt directly with employees by: (a) soliciting them to indicate whether they wanted to share their contact information with the Union, and (b) soliciting them to communicate their shift preferences in a manner that implied that whether they would be granted their shift preference depended on whether they indicated their contact information could be shared with the Union.

As noted above, the Board's criteria for establishing unlawful direct dealing are: "(1) the [employer] was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining; and (3) such communication was made to the exclusion of the Union." *Permanente Medical Group*, supra.

With regard to the shift preferences, there is no dispute that Schofield's form soliciting shift preferences was sent directly to represented employees, and it concerned the potential for changes to employees' hours. The Union was not included in the communication. Accordingly, the form constituted direct dealing regarding employee shift preferences. The shift preferences for bracket 6 employees were to be requested each January according to the collective-

[27] I note that the General Counsel asserted only a violation with regard to Section 8(a)(1) with regard to these allegations, but the Charging Party argued there was a violation of Section 8(a)(5) and (1). Because only the allegations in the complaint are before me, I decline to decide whether the Respondent also violated Section 8(a)(5) as the Charging Party asserts.

bargaining agreement. The Respondent gave no reason for re-soliciting this information rather than just responding to the Union's request.

As for the employees' contact information, "[i]t is well established that the addresses and phone numbers of bargaining unit employees are presumptively relevant for purposes of collective bargaining and must be furnished upon request of the bargaining representative." *River Oak Center for Children*, 345 NLRB 1335 (2005); see also *La Gloria Oil & Gas Co.,* 338 NLRB 858 (2003). Instead of providing the information, the Respondent sent employees a form telling them they did not need to share their contact information with the Union and they could withhold it by checking a box. I find that the juxtaposition of this unlawful opt-out opportunity with the redundant shift-preference request establishes that the Respondent violated the Act as alleged in complaint paragraph 7.[28]

D. Alleged Unilateral Changes

Complaint paragraph 9 alleges that the Respondent bypassed its bargaining obligations and made certain unilateral changes to the employees' terms and conditions of employment, in violation of Section 8(a)(5) and (1) of the Act.

1. Food product samples

Subparagraph 9(a) alleges that, around February or March 2014, the Respondent ceased its practice of providing its employees, at no cost, with food products from the test kitchen and unsalable food products.

Well-settled law provides that an employer may not change the terms and conditions of employment of represented employees without providing their representative with prior notice and an opportunity to bargain over such changes. See *NLRB v. Katz*, 369 U.S. 736, 747 (1962).

The fact that a particular working condition or benefit is not expressly embodied in the governing collective agreement is immaterial where satisfactorily established by practice or custom. See *Citizens Hotel Co.*, 138 NLRB 706, 712–713 (1962), enfd. 326 F.2d 501 (5th Cir. 1962); *Frontier Homes Corporation*, 153 NLRB 1070, 1072–1073 (1965); *Central Ill. Pub. Serv. Co.*, 139 NLRB 1407, 1415 (1962), enfd. 324 F.2d 916 (7th Cir. 1963). Regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even if not addressed in a collective-bargaining agreement. As such, these past practices cannot be changed without offering the unit employees' collective bargaining representative notice and an opportunity to bargain, absent clear and unequivocal waiver of this right. *Sunoco, Inc*., 349 NLRB 240, 244 (2007), citing *Granite City Steel Co*., 167 NLRB 310, 315 (1967); *Queen Mary Restaurants Corp. v. NLRB*, 560 F.2d 403, 408 (9th Cir. 1977); *Exxon Shipping Co*., 291 NLRB 489, 493 (1988); *DMI Distrib. of Del.*, 334 NLRB 409, 411 (2001). This is no less true where the practice is denominated a "privilege," voluntarily instituted or bestowed by the employer. *Cent. Ill. Pub. Serv. Co.,* 139 NLRB at 1415. A past practice must occur with such regularity and frequency that employees could reasonably expect the "practice"

[28] The Charging Party argues that the Respondent failed to provide the Union with necessary and relevant information, but this is not alleged in the complaint. (CP Br. 42–43.)

to continue or reoccur on a regular and consistent basis. *Phila. Coca-Cola Bottling Co*., 340 NLRB 349, 353–354 (2003); *Eugene Iovine Inc*., 328 NLRB 294, 297 (1999).

With regard to the hot food from the test kitchen, I find the General Counsel has established there was a change to an established past practice. The record is undisputed that, except for a couple months in early 2012, the Respondent has consistently provided sample products from the QA kitchen to the employees whenever line 2 was running. The discontinuation of this practice, without bargaining, was an unlawful unilateral change.

Finding a change in the terms and conditions of employment does not end the inquiry, however because the duty to bargain only arises if the changes are "material, substantial and significant." *Alamo Cement Co.*, 281 NLRB 737, 738 (1986); *Flambeau Airmold Corp*., 334 NLRB 165, 171 (2001). The General Counsel bears the burden of establishing this. *North Star Steel Co.*, 347 NLRB 1364, 1367 (2006).

"The availability of food during working hours and the conditions under which it is to be consumed are matters of deep concern to workers . . . . The terms and conditions under which food is available on the job are plainly germane to the working environment." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979). In *Sprain Brook Manor Nursing Home, LLC*, 359 NLRB No. 105 (2013), affd. 361 NLRB No. 54 (2014), the employer had a practice of providing hot lunches to employees after the nursing home residents had been fed. The Board found that discontinuation of this practice and replacement of the hot lunch with sandwiches and salads without bargaining was an unlawful unilateral change to the employees' terms and conditions of employment. Moreover, as the Charging Party points out, cessation of regular but infrequent provision of food to employees can be a material change. *Presto Casting Co.,* 262 NLRB 346, 347 (1982), enfd. 708 F.2d 495 (9th Cir. 1983); *Harowe Servo Controls, Inc.*, 250 NLRB 958, 959 (1980). Likewise, cessation of food or drinks may be material, substantial, and significant even if the items are of low value. *See, e.g. Wisconsin Steel Indus.*, 321 NLRB 1394 (1996)(elimination of coffee and donuts on paydays unlawful unilateral change).

The Respondent cites to *Weather Tec Corp.*, 238 NLRB 1535, 1536 (1978), to support its contention that it did not implement a material, substantial and significant change when it discontinued providing food samples from line 2. In that case, the Board found that the employer did not violate the Act when it ceased providing coffee to employees. In *Weather Tec*, the parties were engaged in bargaining, and the coffee policy was not mentioned by the union during any of the bargaining sessions over the course of 10 months of bargaining. Here, there was an established past practice and the parties were not engaged in contract negotiations. In this context, the great weight of authority establishes that the Respondent implemented a material, significant, and substantial change without notice to the Union or the opportunity to bargain.[29]

The Board has recognized a limited exception to the duty to bargain "when economic exigencies compel prompt action." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). In situations like the present one, where a contract has been negotiated and the issue is a change in

[29] The cases cited in CP Br. pp. 33–35, in addition to those cited herein, establish the weight of the Board's authority on this issue.

terms and conditions in employment, the framework in *RBE Electronics, Inc.*, 320 NLRB 80 (1995), applies. The Board in *RBE* stated:

> [W]here we find that an employer is confronted with an economic exigency compelling prompt action short of the type relieving the employer of its obligation to bargain entirely, we will hold under the *Bottom Line Enterprises* exigency exception, as further explicated here, that the employer will satisfy its statutory obligation by providing the union with adequate notice and an opportunity to bargain. In that event, consistent with established Board law in situations where negotiations are not in progress, the employer can act unilaterally if either the union waives its right to bargain or the parties reach impasse on the matter proposed for change.

Id. at 82 (footnotes omitted).

In the instant case, I find no compelling exigency existed. The Respondent acknowledged that the cooked food from the QA line had never been taken from the facility and re-sold. Moreover, assuming this was a concern, the Respondent was obligated to bargain with the Union prior to unilaterally changing its practice. The Respondent did not claim to know what proposals the Union would have made regarding the changes, or what alternative solutions the give-and-take of bargaining might have generated.

The Respondent cites to *Murphy Oil USA*, 286 NLRB 1039, 1042 (1987), to assert that an employer is not required to bargain over changes required or necessitated by law. The evidence does not show, however, that there was a requirement to cease the practice of providing employees sample products in the cafeteria in order to comply with the law.

Finally, the Respondent contends that there was not an unbroken practice of providing QA samples because they had previously been suspended in 2012. This position, however, takes too rigid a view of past practice. Here, the evidence showed that, for roughly 2 years prior to March 2014, there was a past practice with regard to providing QA samples that occurred with sufficient regularity and frequency that employees could reasonably expect the "practice" to continue or reoccur on a regular and consistent basis. I find, therefore, that the General Counsel has met the burden of proof with regard to the portion of complaint allegation 9(a) that alleges unilateral cessation of food samples from the QA lab.

With regard to unsalable food products, I find the General Counsel has failed to establish a past practice. When asked if there was a practice with regard to garbage product, McGuire testified, "If at times employees asked permission they were given permission to take this product home." (Tr. 24.) No witness testified as to the regularity and frequency of consuming or taking home unsalable products, and the Respondent's witnesses all testified there was no such practice. This is supported by the petition Davies presented, signed by 68 employees, outlining the inconsistency of the Respondent's actions over time. (R Exh. 7.) Accordingly, I recommend dismissal of the portion of complaint allegation 9(a) regarding unsalable products.

2. Changes to union representatives' visits to plant

Complaint subparagraph alleges that on April 22, 2014, the Respondent implemented a requirement that: (i) authorized union representatives give Plant Manager Ligon 24-hours advance notice of the dates of their planned visits to the facility, the time of their planned arrival, and the purpose of their visit; (ii) authorized union representatives sign in and out with Plant Manager Ligon or Human Resources Manager Schofield when visiting the facility; (iii) authorized union representatives limit their visits to the facility to administrative hours; (iv) authorized union representatives confine their visits to the cafeteria; and (v) authorized union representatives not to use the cafeteria as a union hall and to limit their visits to a "respectable amount of time."

The analysis regarding past practice, set forth above, applies here. As a condition of employment, the method of access by employees to their representatives for grievance resolution is a matter related to "wages, hours, and other terms and conditions of employment" within the meaning of Section 8(d) of the Act and is a mandatory subject of bargaining. *Bethlehem Steel Co*., 136 NLRB 1500, 1502 (1962), *enforced,* 320 F.2d 615, 620 (3d Cir. 1963). *See also Westinghouse Electric Corp*., 141 NLRB 733, 735-736 (1963), reversed on other grounds 325 F.2d 126 (7th Cir. 1963); *Motoresearch Co*., 138 NLRB 1490, 1492 (1962); *J & H Rainwear*, 273 NLRB 497 (1984), and *Hous. Coca-Cola Bottling Co*., 265 NLRB 766, 778 (1982). "[A] unilateral change in an employer's policy permitting access by union representatives to its premises is a unilateral change in the employees' terms and conditions of employment and is, ordinarily, unlawful." *Turtle Bay Resorts*, 355 NLRB 1272, 1272 (2010).

Unlike the product samples, some aspects of plant access are addressed in the collective-bargaining agreement. Article 11.3 provides, in relevant part, that union representatives may visit the plant "for the purpose of ascertaining whether or not this Agreement is being observed, and to assist in adjusting grievances." It further states, "Union representatives shall contact the Plant Manager or his designated representative prior to entry."

It is well settled that the Board has the authority to interpret the terms of a collective-bargaining agreement to determine whether an unfair labor practice has been committed. *NLRB v. C & C Plywood Corp.* 385 U.S. 421, 428 (1967*)*; *Resco Prods., Inc,* 331 NLRB 1546 (2000). In *Resco*, the Board described its method of interpreting collective-bargaining agreements as follows:

> In interpreting a contract, the parties' intent underlying the contract language is paramount and is given controlling weight. To determine the parties' intent, the Board looks to both the contract language and to the relevant extrinsic evidence, such as the parties' bargaining history and past practice. When there is no extrinsic evidence, the Board looks to the ordinary meaning of relevant contract terms as applied to the facts of the case.

331 NLRB at 1548. "Where past practice has established a meaning for language that is used by the parties [in their agreement], the language will be presumed to have the meaning given it by past practice." *Pan-Adobe*, *Inc.*, 222 NLRB 313, 325 (1976) (quoting *Pekar v. Local 181, Brewery Workers*, 311 F.2d 628, 636 (6th Cir. 1962), cert. denied 373 U.S. 912 (1963)). A

"unilateral change in the past practice of permitting union access is a material change about which an employer is obligated to bargain." *Casino San Pablo,* 361 NLRB No. 148, slip op at 7 (2014), citing *Ernst Home Centers*, 308 NLRB 848, 849 (1992).

It is clear that longstanding past practice had permitted union representatives access to the plant by checking in with the staff at reception. As such, the past practice has established a meaning for the plant manager's designated representative for purposes of access, i.e. the employees who work in reception. There is no provision in the collective-bargaining agreement regarding signing in or out with any particular management officials, and I find the established past practice was devoid of any such requirement. Moreover, while the collective-bargaining agreement specifies the purpose for the visits, it is silent as to whether the purpose of each visit needs to be pre-announced to the plant manager 24 hours prior. The uncontroverted evidence shows that this was not a requirement until April 22. It is undisputed that the Respondent did not provide notice to the Union or bargain over these changes. In light of the evidence of longstanding past practice of the union representatives visiting the facility without pre-announcement of the time and purpose of each visit, and without signing in or out with any specified management officials, I find there was a unilateral change to the terms and conditions of employment for the represented employees.

The collective-bargaining agreement addresses the timing of the Union's visits to the plant as follows: "The Company shall admit to the plant *during working hours* any authorized representative(s) of the Union for the purpose of ascertaining whether or not this Agreement is being observed, and to assist in adjusting grievances." (Emphasis added.) Based on the undisputed evidence that the Union had an established practice of visiting employees who worked different shifts, I find the term "working hours" encompassed any time a unit member was scheduled to work.

The collective-bargaining agreement does not directly address the duration of the Union's visits to the facility, but require visits to be on "non-working time so that there shall be no interference with or interruption of normal operating conditions." The Respondent did not submit evidence that there was interruption of normal operating conditions. The only evidence presented is that on April 22, Ligon saw Davies talking to Carmen Aguirre in the laundry room while she was on the clock. The subject of the conversation is not a matter of record, and there was no evidence presented that Davies or any other union representative conducted union business with employees during working time, in contravention of the contract.

With regard to location of the visits, the collective-bargaining agreement requires that the Union's authorized visits occur in "non-working areas" of the plant. The evidence establishes that the union representatives' established past practice was to visit employees in the cafeteria, the hallway where the union bulletin board was located, the hallway where the schedule was posted, outside the plant where employees smoked, the restroom, training room, and laundry room. Clearly, there are areas of the facility other than the cafeteria that can only be categorized as non-working areas, and the restriction of Davies from these areas is a unilateral change from established past practice.

The Respondent argues that the changes to Davies' access were not material, substantial and significant. I disagree. As the Board recently stated in *Casino San Pablo,* supra, when

discussing a change to a union representative's access to the breakroom, "a unilateral change in the past practice of permitting union access is a material change about which an employer is obligated to bargain." Here, by requiring management approval for Davies to visit, and to require Davies to announce the purpose of his visit, the Respondent unilaterally removed a "real and substantial benefit" the Union previously enjoyed. *Granite City Steel Co*., 167 NLRB 310, 315 (1967). Having a manager aware each time an employee requests to meet with Davies and requiring Davies to sign in with management would clearly inhibit the kind of candid exchanges possible between the represented employees and their union agents. Such a requirement is a way to make certain mangers know when and with whom meetings between the union agent and unit employees occur.

The Respondent cites to *Peerless Food Products*, 236 NLRB 161 (1978), for support. In that case, the employer limited the union representative's access to the production floor during working hours to engage in conversations unrelated to contract matters. The instant case is distinguishable in that Davies never sought access to the production floor.[30] The Respondent also cites to *Nynex Corp.*, 338 NLRB 659 (2002), where the Board found the employer's cancellation of the union representatives' magnetic access cards was not a material, significant, and substantial change. The employer, in response to an incident, beefed up security and required all visitors, including the union representatives, to present identification in order to access the facility. The union representatives were not required to obtain permission to enter the facility, and once inside, their movements within the facility were unrestricted. The restrictions in the instant case, detailed above, were significantly more extensive.

Based on the foregoing, I find the General Counsel has met its burden to prove that the Respondent unilaterally changed material aspects of Davies' visitation to the plant as alleged in complaint paragraph 9(b).

E. The Respondent's Adverse Inference Request

The Respondent has requested that I draw an adverse inference based on the Union's failure to instruct Olvera to look for emails and other responsive documents to its subpoena requests. The subpoena at issue requests, in relevant part, all documents concerning or mentioning Adam Ligon and Karyn Schofield and all documents relating to paragraphs 6–10 of the complaint.

Jaime Olvera was not appointed as a business representative for the unit members at J&J on April 25, 2014. This post-dates any of the allegations before me, and therefore it is unsurprising that none of the allegations concern or mention Olvera. There is no evidence connecting Olvera to Ligon, Schofield, or anyone at J&J prior to April 25. As a result, I find he would not have relevant information, and therefore his failure to search for emails has not prejudiced the Respondent. . See *CPS Chemical Co.*, 324 NLRB 1018, 1019 (1997), enfd. 160 F.3d 150 (3d Cir. 1998) (no prejudice suffered by non-production). For this reason, I decline to draw an adverse inference.

[30] For the same reason, this case is distinguishable from *National Sea Products*, 260 NLRB 3 (1982).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By: (a) telling employees that the Union's representative was no longer permitted on the Respondent's premises; (b) failing and refusing to recognize the Union's representative; (c) denigrating and disparaging the Union; (d) encouraging employees to abandon support for the Union and its representative; (e) promising employees, by soliciting employee complaints and grievances, increased benefits and improved terms and conditions of employment if they abandoned their support for the Union, the Respondent has violated Section 8(a)(1) of the Act.

4. By: (a) soliciting employees to indicate whether their contact information could be shared with the Union; (b) soliciting employees to communicate shift preferences directly to the Respondent in a manner that implied that granting the shift preference depended on whether they indicated their contact information could be shared with the Union; (c) ceasing its practice of providing employees with cooked food products in the cafeteria; (d) implementing a requirement that union representatives provide the plant manager with 24-hours notice of their visits to the facility; (e) implementing a requirement that union representatives sign in and out of the plant with either the plant manager or the human resources manager; (f) implementing a requirement union representatives visit the plant during administrative hours; (g) implementing a requirement that union representatives confine their visits to the cafeteria; (h) imposing a requirement that Union representatives not use the cafeteria as a union hall and limit visits to a "respectable" amount of time; and (i) banning Union Representative Richard Davies from the facility, the Respondent has violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having told employees that the Union's representative was no longer permitted on the Respondent's premises; failed and refused to recognize the Union's representative; denigrated and disparaged the Union; encouraged employees to abandon support for the Union and its representative; and promised employees, by soliciting employee complaints and grievances, increased benefits and improved terms and conditions of employment if they abandoned their support for the Union, the Respondent will be ordered to cease and desist from these actions.

Having solicited employees to indicate whether their contact information could be shared with the Union; solicited employees to communicate shift preferences directly to the Respondent in a manner that implied that granting the shift preference depended on whether they indicated their contact information could be shared with the Union; ceased its practice of providing employees with food products; implemented a requirement that union representatives provide the

plant manager with 24-hours notice of their visits to the facility; implemented a requirement that union representatives sign in and out of the plant with either the plant manager or the human resources manager; implemented a requirement that union representatives visit the plant during administrative hours; implemented a requirement that union representatives confine their visits to the cafeteria; imposed a requirement that union representatives not use the cafeteria as a Union hall and limit visits to a "respectable" amount of time; and banned Union representative Richard Davies from the facility, the Respondent must rescind these actions and restore the status quo ante.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[31]

ORDER

The Respondent, J & J Snack Foods Handhelds Corp., Weston, Oregon, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Bypassing Teamsters, Warehousemen, Garage Employees and Helpers, Local Union No. 839, affiliated with International Brotherhood of Teamsters (the Union) and dealing with its employees directly regarding their wages, hours and working conditions;

(b) Soliciting grievances from employees, and promising to remedy them;

(c) Disparaging or denigrating the Union;

(d) Making changes in employees' wages, hours and working conditions without bargaining with the Union;

(e) Making changes to the access policy in the collective bargaining agreement without bargaining and reaching agreement with the Union;

(f) Refusing to meet with, recognize and/or bargain with Union Business Representative, Rich Davies ("Davies"), or any other individual designated by the Union; and

(g) Banning Davies from the plant and threatening him with trespass if he visits the plant.

(h) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[31] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Meet with, recognize and bargain with Davies as the representative of its employees;

(b) Restore all of Davies' access rights that he had prior to April 23, 2014;

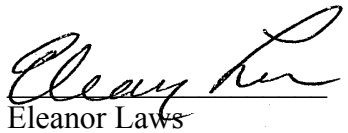
(c) Rescind all changes made to the Union's visitation policy in the collective bargaining agreement on April 22, 2014;

(d) Restore the practice of providing employees, at no cost, with food products from the test kitchen; and

(e) Within 14 days after service by the Region, post at its facility in Weston, Oregon copies of the attached notice marked "Appendix"[32] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 14, 2014.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 13, 2015



Eleanor Laws
Administrative Law Judge

[32] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

Teamsters, Warehousemen, Garage Employees and Helpers, Local Union No. 839, affiliated with International Brotherhood of Teamsters (the "Union") is the exclusive representative in dealing with us regarding wages, hours, and other working conditions of the employees employed at our facility in Weston, Oregon.

WE WILL NOT bypass your Union and deal directly with you concerning your wages, hours and working conditions.

WE WILL NOT ask you about your complaints and grievances and imply that we will fix them in order to discourage you from supporting a union.

WE WILL NOT disparage or denigrate your Union or union representatives to you by any means, including our letter of April 24, 2014.

WE WILL NOT make changes in your wages, hours, or working conditions, including our providing you with food products, without the agreement of the Union or without first reaching good faith impasse with the Union.

WE WILL NOT make changes to the Union's access to the facility without first notifying the Union and providing an opportunity to bargain.

WE WILL NOT refuse to meet with, recognize and/or bargain with Union Business Representative Rich Davies (Davies) or any other individual designated by the Union as your bargaining representative.

WE WILL NOT ban Davies from the premises or the plant and WE WILL NOT threaten Davies with trespass if he visits the facility.

WE WILL meet with, recognize and bargain with Davies as your designated collective bargaining representative.

WE WILL restore all of Davies' access rights that he had prior to our decision to ban him from the facility.

WE WILL rescind all changes we made to the Union's access to the facility without bargaining with the Union.

WE WILL rescind any changes we made to the past practice of providing you, at no cost, with food from our test kitchen to consume in the cafeteria.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

915 2nd Avenue, Room 2948, Seattle, WA 98174-1078
(206) 220-6300, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/19-CA-126632 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (206) 220-6284.